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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

7 Case No. 2:17-CV-02459 (VEB)

8 KORETI TOLOAI,

9 Plaintiff,

DECISION AND ORDER

10 vs.

11 NANCY BERRYHILL, Acting
Commissioner of Social Security,

12 Defendant.

13
14 I. INTRODUCTION

15 In July of 2013, Plaintiff Koreti Toloai applied for Disability Insurance
16 benefits and Supplement Security Income benefits under the Social Security Act.
17 The Commissioner of Social Security denied the applications.

1 Plaintiff, by and through her attorney, Lawrence D. Rohlfing, Esq.
2 commenced this action seeking judicial review of the Commissioner's denial of
3 benefits pursuant to 42 U.S.C. §§ 405 (g) and 1383 (c)(3).

4 The parties consented to the jurisdiction of a United States Magistrate Judge.
5 (Docket No. 11, 12, 19). On January 5, 2018, this case was referred to the
6 undersigned pursuant to General Order 05-07. (Docket No. 15).

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8 **II. BACKGROUND**

9 Plaintiff applied for benefits on July 10, 2013, alleging disability beginning
10 January 1, 2008. (T at 218-22, 223-30).¹ The applications were denied initially and
11 on reconsideration. Plaintiff requested a hearing before an Administrative Law
12 Judge ("ALJ").

13 On November 19, 2015, a hearing was held before ALJ Edward Graham. (T at
14 51). Plaintiff appeared with her attorney and testified. (T at 54-60). The ALJ also
15 received testimony from Randi Langford-Hetrick, a vocational expert. (T at 60-64).

16 On December 16, 2015, the ALJ issued a written decision denying the
17 applications for benefits. (T at 9-26). The ALJ's decision became the

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19 ¹Citations to ("T") refer to the administrative record transcript at Docket No. 16.

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1 Commissioner's final decision on January 26, 2017, when the Appeals Council
2 denied Plaintiff's request for review. (T at 1-6).

3 On March 29, 2017, Plaintiff, acting by and through her counsel, filed this
4 action seeking judicial review of the Commissioner's denial of benefits. (Docket No.
5 1). The Commissioner interposed an Answer on August 29, 2017. (Docket No. 15).
6 The parties filed a Joint Stipulation on November 27, 2017. (Docket No. 17).

7 After reviewing the pleadings, Joint Stipulation, and administrative record,
8 this Court finds that the Commissioner's decision must be reversed and this case
9 remanded for further proceedings.

11 III. DISCUSSION

12 A. Sequential Evaluation Process

13 The Social Security Act ("the Act") defines disability as the "inability to
14 engage in any substantial gainful activity by reason of any medically determinable
15 physical or mental impairment which can be expected to result in death or which has
16 lasted or can be expected to last for a continuous period of not less than twelve
17 months." 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). The Act also provides that a
18 claimant shall be determined to be under a disability only if any impairments are of
19 such severity that he or she is not only unable to do previous work but cannot,

1 considering his or her age, education and work experiences, engage in any other
2 substantial work which exists in the national economy. 42 U.S.C. §§ 423(d)(2)(A),
3 1382c(a)(3)(B). Thus, the definition of disability consists of both medical and
4 vocational components. *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9th Cir. 2001).

5 The Commissioner has established a five-step sequential evaluation process
6 for determining whether a person is disabled. 20 C.F.R. §§ 404.1520, 416.920. Step
7 one determines if the person is engaged in substantial gainful activities. If so,
8 benefits are denied. 20 C.F.R. §§ 404. 1520(a)(4)(i), 416.920(a)(4)(i). If not, the
9 decision maker proceeds to step two, which determines whether the claimant has a
10 medically severe impairment or combination of impairments. 20 C.F.R. §§
11 404.1520(a)(4)(ii), 416.920(a)(4)(ii).

12 If the claimant does not have a severe impairment or combination of
13 impairments, the disability claim is denied. If the impairment is severe, the
14 evaluation proceeds to the third step, which compares the claimant's impairment(s)
15 with a number of listed impairments acknowledged by the Commissioner to be so
16 severe as to preclude substantial gainful activity. 20 C.F.R. §§ 404.1520(a)(4)(iii),
17 416.920(a)(4)(iii); 20 C.F.R. § 404 Subpt. P App. 1. If the impairment meets or
18 equals one of the listed impairments, the claimant is conclusively presumed to be
19 disabled. If the impairment is not one conclusively presumed to be disabling, the

1 evaluation proceeds to the fourth step, which determines whether the impairment
2 prevents the claimant from performing work which was performed in the past. If the
3 claimant is able to perform previous work, he or she is deemed not disabled. 20
4 C.F.R. §§ 404.1520(a)(4)(iv), 416.920(a)(4)(iv). At this step, the claimant's residual
5 functional capacity (RFC) is considered. If the claimant cannot perform past relevant
6 work, the fifth and final step in the process determines whether he or she is able to
7 perform other work in the national economy in view of his or her residual functional
8 capacity, age, education, and past work experience. 20 C.F.R. §§ 404.1520(a)(4)(v),
9 416.920(a)(4)(v); *Bowen v. Yuckert*, 482 U.S. 137 (1987).

10 The initial burden of proof rests upon the claimant to establish a *prima facie*
11 case of entitlement to disability benefits. *Rhinehart v. Finch*, 438 F.2d 920, 921 (9th
12 Cir. 1971); *Meanel v. Apfel*, 172 F.3d 1111, 1113 (9th Cir. 1999). The initial burden
13 is met once the claimant establishes that a mental or physical impairment prevents
14 the performance of previous work. The burden then shifts, at step five, to the
15 Commissioner to show that (1) plaintiff can perform other substantial gainful
16 activity and (2) a “significant number of jobs exist in the national economy” that the
17 claimant can perform. *Kail v. Heckler*, 722 F.2d 1496, 1498 (9th Cir. 1984).

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B. Standard of Review

Congress has provided a limited scope of judicial review of a Commissioner's decision. 42 U.S.C. § 405(g). A Court must uphold a Commissioner's decision, made through an ALJ, when the determination is not based on legal error and is supported by substantial evidence. *See Jones v. Heckler*, 760 F.2d 993, 995 (9th Cir. 1985); *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999).

7 “[The Commissioner’s] determination that a plaintiff is not disabled will be
8 upheld if the findings of fact are supported by substantial evidence.” *Delgado v.*
9 *Heckler*, 722 F.2d 570, 572 (9th Cir. 1983)(citing 42 U.S.C. § 405(g)). Substantial
10 evidence is more than a mere scintilla, *Sorenson v. Weinberger*, 514 F.2d 1112, 1119
11 n 10 (9th Cir. 1975), but less than a preponderance. *McAllister v. Sullivan*, 888 F.2d
12 599, 601-02 (9th Cir. 1989). Substantial evidence “means such evidence as a
13 reasonable mind might accept as adequate to support a conclusion.” *Richardson v.*
14 *Perales*, 402 U.S. 389, 401 (1971)(citations omitted). “[S]uch inferences and
15 conclusions as the [Commissioner] may reasonably draw from the evidence” will
16 also be upheld. *Mark v. Celebreeze*, 348 F.2d 289, 293 (9th Cir. 1965). On review,
17 the Court considers the record as a whole, not just the evidence supporting the
18 decision of the Commissioner. *Weetman v. Sullivan*, 877 F.2d 20, 22 (9th Cir.
19 1989)(quoting *Kornock v. Harris*, 648 F.2d 525, 526 (9th Cir. 1980)).

1 It is the role of the Commissioner, not this Court, to resolve conflicts in
2 evidence. *Richardson*, 402 U.S. at 400. If evidence supports more than one rational
3 interpretation, the Court may not substitute its judgment for that of the
4 Commissioner. *Tackett*, 180 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579 (9th
5 Cir. 1984). Nevertheless, a decision supported by substantial evidence will still be
6 set aside if the proper legal standards were not applied in weighing the evidence and
7 making the decision. *Brawner v. Secretary of Health and Human Services*, 839 F.2d
8 432, 433 (9th Cir. 1987). Thus, if there is substantial evidence to support the
9 administrative findings, or if there is conflicting evidence that will support a finding
10 of either disability or non-disability, the finding of the Commissioner is conclusive.
11 *Sprague v. Bowen*, 812 F.2d 1226, 1229-30 (9th Cir. 1987).

12 **C. Commissioner's Decision**

13 The ALJ determined that Plaintiff had not engaged in substantial gainful
14 activity since January 1, 2008, the alleged onset date, and met the insured status
15 requirements of the Social Security Act through December 31, 2013 (the “date last
16 insured”). (T at 15). The ALJ found that Plaintiff’s diabetes, gout, obesity,
17 hypertension, and low back and bilateral hand arthritis were “severe” impairments
18 under the Act. (Tr. 15).

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1 However, the ALJ concluded that Plaintiff did not have an impairment or
2 combination of impairments that met or medically equaled one of the impairments
3 set forth in the Listings. (T at 15).

4 The ALJ determined that Plaintiff retained the residual functional capacity
5 (“RFC”) to perform light work, as defined in 20 CFR § 404.1567 (b), including
6 lifting/carrying 10 pounds frequently and 20 pounds occasionally; sitting about 6
7 hours in an 8-hour workday; standing/walking about 6 hours in an 8-hour workday;
8 occasionally climbing, balancing, stooping, kneeling, crouching, and crawling; and
9 occasionally performing fine and gross motor manipulation with the upper
10 extremities. (T at 15).

11 The ALJ concluded that Plaintiff could not perform her past relevant work as
12 a cashier. (T at 20). Considering Plaintiff’s age (46 years old on the alleged onset
13 date), education (at least high school), work experience (no past relevant work), and
14 residual functional capacity, the ALJ found that jobs exist in significant numbers in
15 the national economy that Plaintiff can perform. (T at 20).

16 Accordingly, the ALJ determined that Plaintiff was not disabled within the
17 meaning of the Social Security Act between January 1, 2008 (the alleged onset date)
18 and December 21, 2015 (the date of the decision) and was therefore not entitled to
19 benefits. (T at 21). As noted above, the ALJ’s decision became the Commissioner’s

1 final decision when the Appeals Council denied Plaintiff's request for review. (T at
2 1-6).

3 **D. Disputed Issues**

4 As set forth in the Joint Stipulation (Docket No. 17), Plaintiff offers three (3)
5 main arguments in support of her claim that the Commissioner's decision should be
6 reversed. First, she challenges the ALJ's consideration of environmental limitations.
7 Second, Plaintiff contends that the ALJ did not adequately assess her impairment
8 related to dexterity. Third, she challenges the ALK's step five analysis. This Court
9 will address each argument in turn.

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11 **IV. ANALYSIS**

12 **A. Environmental Limitation**

13 During the summer of 2014, Plaintiff sought treatment from Dr. Ravi
14 Menghani, an ophthalmologist. Plaintiff complained of dry, itchy, watery, red eyes,
15 with blurry vision and halos around lights. (T at 512). Dr. Menghani assessed dry
16 eyes, as well as pterygia (a growth on the cornea) of both eyes. (T at 515). He
17 advised Plaintiff to use warm compresses, to administer preservative free artificial
18 tears 4-6 times daily, apply ointments, and increase her diet of fish oil, flaxseed, and
19 foods containing omega-3 fatty acids. (T at 515). Dr. Menghani suggested that

1 Plaintiff use sunglasses outdoors and humidifiers indoors; he recommended that she
2 avoid having heaters or air conditioners directly in her eyes. (T at 515). Dr.
3 Menghani made similar findings and recommendations in March of 2015. (T at 527).

4 Plaintiff contends that the ALJ was obliged to consider whether Dr.
5 Menghani's recommendations concerning dry eye symptoms would translate into
6 environmental limitations, which in turn might limit Plaintiff's ability to perform the
7 representative occupations identified by the vocational expert.

8 This Court finds no reversible error as to this aspect of the ALJ's decision.
9 Although Plaintiff's dry eyes are doubtless a source of pain and frustration, she has
10 not alleged or established any vision loss. Indeed, several eye examinations did not
11 reveal significant visual limitations. (T at 513-14, 517-18, 521-22, 525-26).
12 Moreover, while Plaintiff complained of eye-related symptoms (e.g., dry, itchy,
13 watery eyes), there is no indication that these symptoms created work-related,
14 functional limitations – i.e. that they were so significant that they would impact her
15 ability to perform work.

16 Notably, Dr. Menghani did not assess any work-related limitations, but rather
17 recommended a series of interventions (using sunglasses outdoors, a humidifier
18 indoors, and avoiding direct airflow from a heater or air conditioner to the eyes) that
19 could be readily accommodated in a work environment. While it would have been

1 preferable for the ALJ to have addressed this issue more directly, Plaintiff
2 nevertheless bears the burden of proof. This Court finds that Plaintiff has not proven
3 that her dry eye condition imposes limitations sufficiently significant to undermine
4 the ALJ's overall disability determination.

5 **B. Dexterity**

6 In October of 2013, Dr. John Sedgh performed a consultative examination.
7 Dr. Sedgh assessed Plaintiff's motor strength as "4/5 in all extremities." (T at 434).
8 He opined that Plaintiff was limited to occasional gross and fine hand manipulations.
9 (T at 435). Plaintiff complained of tingling at the elbows and in her hands; she
10 described her hands and arms as "lazy and tired." (T 55, 57-58, 311).

11 Plaintiff argues that the ALJ did not adequately address the concerns related to
12 her dexterity. However, the ALJ incorporated a limitation to occasional fine motor
13 manipulation with the upper extremities into the RFC determination. (T at 15). This
14 is consistent with Dr. Sedgh's assessment. The ALJ incorporated the limitation into
15 the hypothetical posed to the vocational expert (T at 62). The vocational expert
16 testified that a hypothetical claimant with such limitations could perform the
17 representative occupations of usher, crossing guard, information clerk, and counter

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1 attendant. (T at 62). The vocational expert testified that her assessment was
2 consistent with the *Dictionary of Occupational Titles* (“DOT”).²

3 The ALJ has a duty to inquire about “any possible conflict” between the
4 vocational expert’s testimony and the DOT. *See SSR 00-4p; Massachi v. Astrue,*
5 486 F.3d 1149, 1152-54 (9th Cir. 2007). If there is such a conflict, the ALJ may
6 accept the vocational expert’s testimony only if there is “persuasive evidence to
7 support the deviation.” *Pinto v. Massanari*, 249 F.3d 840, 846 (9th Cir. 2001)
8 (quoting *Johnson v. Shalala*, 60 F.3d 1428, 1435 (9th Cir. 1995)).

9 Here, Plaintiff references dexterity ratings set forth in the *Revised Handbook*
10 for Analyzing Jobs (“RHAJ”) and questions whether she can perform the
11 representative occupations, given that they have average to below average dexterity
12 ratings in the RHAJ.

13 Plaintiff cites no authority for the proposition that an ALJ is obliged to
14 address apparent conflicts between the vocational expert’s testimony and the RHAJ.
15 Courts have consistently rejected attempts to require the ALJ to reconcile the
16 vocational expert’s testimony with publications other than the DOT. *See Schoux v.*
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18 ² “The Social Security Administration has taken administrative notice of the *Dictionary of*
19 *Occupational Titles*, which is published by the Department of Labor and gives detailed physical
requirements for a variety of jobs.” *Massachi v. Astrue*, 486 F.3d 1149, 1152 n. 8 (9th Cir.
2007)(citing 20 C.F.R. § 416.966(d)(1)).

1 *Colvin*, No. 1:15-cv-01549, 2016 U.S. Dist. LEXIS 75463, at *8-9 (N.D. Cal. June
2 9, 2016)(“Plaintiff has pointed to no authority indicating that an ALJ is required to
3 inquire whether a vocational expert’s testimony … is consistent with … any source
4 other than the DOT.”); *see also Walker v. Berryhill*, No. CV 16-01040, 2017 U.S.
5 Dist. LEXIS 42524, at *7-*11 (C.D. Cal. Mar. 23, 2017)(collecting cases). There
6 are two primary justifications for this limitation on the scope of the ALJ’s inquiry.
7 First, the primacy of the DOT is well-established. *Walker*, 2017 U.S. Dist. LEXIS
8 42524, at *10 (citing SSR 00-4p). Second, concerns of administrative economy and
9 efficiency weigh against requiring the ALJ to scour a conceivably limitless series of
10 sources and publications for potential conflicts with the vocational expert’s
11 testimony. *Id.* at *10-11.

12 As such, this Court declines to find that the ALJ was obliged to explore
13 arguable conflicts between the vocational expert’s testimony and authorities other
14 than the DOT.

15 **C. Step Five Analysis**

16 At step five of the sequential evaluation, the burden is on the Commissioner to
17 show that (1) the claimant can perform other substantial gainful activity and (2) a
18 “significant number of jobs exist in the national economy” which the claimant can
19 perform. *Kail v. Heckler*, 722 F.2d 1496, 1498 (9th Cir. 1984). If a claimant cannot

1 return to his previous job, the Commissioner must identify specific jobs existing in
2 substantial numbers in the national economy that the claimant can perform. See
3 *Johnson v. Shalala*, 60 F.3d 1428, 1432 (9th Cir.1995).

4 The Commissioner may carry this burden by “eliciting the testimony of a
5 vocational expert in response to a hypothetical that sets out all the limitations and
6 restrictions of the claimant.” *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir.1995).

7 Here, the ALJ concluded that Plaintiff could perform work that exists in
8 significant numbers in the national economy, citing four representative occupations:
9 usher, crossing guard, information clerk, and counter attendant. (T at 20-21). This
10 conclusion was based on the vocational expert’s testimony. (T at 21).

11 This Court finds that the ALJ’s step five analysis must be revisited on remand.

12 First, the ALJ’s finding that Plaintiff could perform the information clerk
13 position is flawed. Although the vocational expert initially identified that
14 occupation as one a hypothetical claimant with Plaintiff’s RFC could perform, on
15 cross-examination by Plaintiff’s counsel, the vocational expert appeared to concede
16 that the position required frequent handling, which would be precluded by Plaintiff’s
17 limitation to occasional fine and gross manipulation with the upper extremities. (T at
18 63).

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1 Likewise, Plaintiff notes, and the Commissioner concedes, the DOT
2 description for the counter attendant position indicates that it requires frequent
3 handling. DOT 237.367-018. The ALJ did not identify or resolve this apparent
4 conflict between the DOT and the vocational expert's testimony.

5 The Commissioner contends that the ALJ's errors regarding the counter
6 attendant and information clerk positions are harmless because the ALJ identified
7 two other positions (usher and crossing guard) that Plaintiff could perform.
8 However, Plaintiff offers evidence calling into question whether those positions,
9 which are typically performed on a part-time basis, actually exist in significant
10 numbers in the national economy. The Commissioner responds that this Court
11 should reject Plaintiff's attempt to offer new evidence and argues that this Court
12 should not accept that evidence as "more reliable" than the evidence relied upon by
13 the ALJ.

14 This Court declines to pass on the question of which evidence is more reliable,
15 as beyond the scope of its review here. However, this Court is tasked with
16 determining whether the ALJ's decision is supported by "such evidence as a
17 reasonable mind might accept as adequate to support a conclusion." *Richardson v.*
18 *Perales*, 402 U.S. 389, 401 (1971). Here, there is ample reason to question the
19 adequacy of the evidence and reasoning. The vocational expert appears to have

1 erred in identifying two positions that would be precluded for a claimant with
2 Plaintiff's limitations according to the DOT descriptions. The evidence cited by
3 counsel, which not necessarily dispositive, at least calls into question the adequacy
4 of the vocational expert's analysis of the availability of the remaining positions.
5 Although it would certainly have been preferable for Plaintiff's counsel to have
6 queried the vocational expert regarding this evidence during the hearing, this Court
7 declines the Commissioner's assertion that counsel waived the argument,
8 particularly because it concerns the step five analysis, where the Commissioner
9 bears the burden. *See Clark v. Colvin*, No. 2-14-cv-01586, 2015 U.S. Dist. LEXIS
10 127159, at *13-14 (E.D. Cal. Sep't 21, 2015).

11 Accordingly, the ALJ's step five analysis must be revisited on remand.

12 **D. Remand**

13 In a case where the ALJ's determination is not supported by substantial
14 evidence or is tainted by legal error, the court may remand the matter for additional
15 proceedings or an immediate award of benefits. Remand for additional proceedings
16 is proper where (1) outstanding issues must be resolved, and (2) it is not clear from
17 the record before the court that a claimant is disabled. *See Benecke v. Barnhart*, 379
18 F.3d 587, 593 (9th Cir. 2004).

1 Here, this Court finds that remand for further proceedings is warranted. The
2 ALJ's step five analysis was flawed for the reasons stated above. It is not clear from
3 the record that Plaintiff is disabled, but there is a material outstanding issue to be
4 resolved on remand. A remand for further proceedings is therefore the right remedy.

V. ORDERS

IT IS THEREFORE ORDERED that:

Judgment be entered REVERSING the Commissioner's decision and REMANDING this action for further proceedings consistent with this Decision and Order, and it is further ORDERED that

The Clerk of the Court file this Decision and Order, serve copies upon counsel for the parties, and CLOSE this case without prejudice to a timely application for attorneys' fees and costs.

DATED this 14th day of May, 2018,

/s/Victor E. Bianchini
VICTOR E. BIANCHINI
UNITED STATES MAGISTRATE JUDGE